Supreme Court, U.S.
FILED

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

MARCI J. BITTNER,

Petitioner

v.

SNYDER COUNTY, PENNSYLVANIA, and MICHAEL SHOLLEY, District Attorney of Snyder County,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

DONALD L. REIHART*
JAN S. BARNETT
THE LAW OFFICES OF
DONALD L. REIHART
3015 Eastern Boulevard
York, PA 17402
(717) 755-2799

* *Counsel of Record* *Attorneys for Petitioner*

QUESTION PRESENTED

1. Is the Constitutional guarantee of due process violated when a District Attorney prosecuting a criminal case causes a bench warrant to issue for a witness, and instead of following the statutory procedural mandate that the arrestee be held in the County jail until a judicial hearing on the bench warrant may be timely had, the District Attorney rather directs the arresting police officer to deliver the handcuffed arrestee to his office for ex parte verbal abuse and physical intimidation, including threatening her family?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is not published, but is reported at *Bittner v. Snyder County*, 2009 WL 3022133 (C.A. 3 (Pa.)) 2009. The Third Circuit Court of Appeals affirmed the January 26, 2009 decision of the United States District Court for the Middle District of Pennsylvania, which is also not published, but which is reported at 2009 WL 179776 (M.D. Pa.) 2009.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Third Circuit's opinion was rendered on September 23, 2009. Petitioner herein filed a timely Petition for Rehearing en Banc or, in the Alternative, for Panel Rehearing, which the Third Circuit Court of Appeals denied on November 12, 2009.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, 14th Amendment, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction

thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 United States Code, Section 1983

Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, Suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Rule 150(A), Pennsylvania Rules of Criminal Procedure

Rule 150. Bench Warrants

(A) In a court case when a bench warrant is executed, the case is to proceed in accordance with the following procedures.

(1) When a defendant or witness is arrested pursuant to a bench warrant, he or she shall be taken without unnecessary delay for a hearing on the bench warrant. The hearing shall be conducted by the judicial officer who issued the bench warrant, or, another judicial officer designated by the president judge or by the president judge's designee to conduct bench warrant hearings.

. . . .

(5) The bench warrant hearing shall be conducted without unnecessary delay after the individual is lodged in the jail of the county of issuance on that bench warrant.

. . . .

(B) As used in this rule, "judicial officer" is limited to the magisterial district judge or common pleas court judge who issued the bench warrant, or the magisterial district

judge or common pleas court judge designated by the president judge or by the president judge's designee to conduct bench warrant hearings, or in Philadelphia, trial commissioners.

STATEMENT OF THE CASE

1. Petitioner Marci J. Bittner ("Bittner") seeks review of the Third Circuit Court of Appeals judgment, which affirmed the judgment of the United States District Court for the Middle District of Pennsylvania. The District Court had jurisdiction of this matter, in the first instance, pursuant to 8 U.S.C. §§ 1331 and 1367.

2. Bittner claims that the District Attorney of Snyder County, Pennsylvania, violated her federal constitutional rights by causing a bench warrant to issue and then directing that the arresting police officer bring her directly to his office rather than to the county jail pending a judicial hearing on the contempt charge, as required by Rule 150 of the Pennsylvania Rules of Criminal Procedure and the federal guarantee of Due Process (contained in the 4th Amendment, and made applicable to the States by the 14th Amendment).[1]

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[1] Bittner's Complaint in the District Court also alleged that the District Attorney had no probable cause to apply for a bench warrant for her arrest. However, the District Court broadly applied 11th Amendment immunity to all of the District Attorney's actions, and assumed that the District Attorney's request for the bench warrant fell within his prosecutorial role.

3. Bittner is a mother of three young children and resides in York County, Pennsylvania. She was served with a subpoena to testify at the criminal trial of her ex-husband to occur in Snyder County from May 29 through June 1, 2007. Bittner repeatedly informed the Office of the District Attorney that she was physically disabled from driving (she has a seizure disorder and is not licensed to drive) and otherwise had no transportation to the trial, which was eighty-seven miles from her home. The Office assured Bittner that the District Attorney was aware of her travel needs, and that arrangements would be made for her to attend the trial.

On May 29, 2007, a bench warrant was applied for by the Office of the District Attorney and granted by the Honorable President Judge Harold F. Woelfel Jr. of the Court of Common Pleas of Snyder County.[2]

Petitioner disputed this point before the District Court. The Third Circuit held that the District Court's rulings based on 11th Amendment immunity were error, as Plaintiff's Complaint named the District Attorney in his official, rather than his individual, capacity and thus imparted municipal liability on Snyder County. However, the Third Circuit Court of Appeals failed to consider whether the District Attorney's application for the bench warrant was supported by probable cause. Petitioner expects that, on remand, the District Court will decide this issue in the first instance.

[2] Snyder and Union Counties in Pennsylvania constitute the Commonwealth's 17th Judicial District. There are only two Judges, including President Judge Woelfel, for both Counties. In the 2009 Municipal Election held in Snyder and Union Counties, former District Attorney Michael Sholley, the District Attorney whose conduct is at issue here, was elected to replace the retiring judge. Judge Sholley and President Judge Woelfel

The following day, a Middleburg Borough Police Officer arrested Bittner at her York County residence, handcuffed her, and transported her to Snyder County, from whence the bench warrant had issued. Rather than being held in the County jail until a judicial hearing could be had on the bench warrant, Bittner was taken directly to the personal audience of the District Attorney who, without judicial supervision, questioned and harassed Bittner to his satisfaction.

During the interrogation, Bittner reminded the District Attorney that his staff had assured her transportation as well as supervision for her young children during her attendance at trial. While Bittner was held in his office, the District Attorney presented an application to vacate the bench warrant, which was granted by the President Judge at 2:10 p.m. on May 30. In his application, the District Attorney made no mention that Bittner had been arrested in York County by a Snyder County police offer, had been transported to his office and was then and there present, or that Bittner's failure to appear at the trial had not been willful. Rather, the District Attorney merely stated that the "Commonwealth has made contact with Marcy[sic] Bittner since the warrant was issued," and that "Marcy[sic] Bittner has assured the Commonwealth that she would appear in the future."[3]

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are now the sole members of the Bench in Snyder and Union Counties.

[3] See note 1, *supra*. The Court of Common Pleas of Luzerne County in Pennsylvania has been under judicial investigation following revelation in the summer of 2009, *inter alia*, of a

There is no indication that, at the time the bench warrant was vacated, the Court of Common Pleas was aware that Bittner had been arrested and transported to Snyder County, was then and there held captive in the District Attorney's office with police presence at the direction of the District Attorney, and that she had been denied due process and the judicial hearing mandated by Rule 150.

Bittner was then taken from the District Attorney's Office, and transported by police to a house of a relative in Perry County, nearly seventy miles from her home. Bittner was left there, and had no immediate means to return home.

4. Most states have statutes that require a prompt appearance of an arrested person before a judicial officer. *Coleman v. Frantz*, 754 F.2d 719, 721 n.1 (7th Cir. 1985), *citing* A.L.I., MODEL CODE OF PRE-ARRAGNMENT PROCEDURE 577-79, App. I (1975). Pennsylvania is within the majority of states

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kickback scandal, whereby two of the County judges received kickbacks from a juvenile detention facility for juveniles they sentenced there. To further their scheme, it is alleged that the judges deprived juvenile defendants of the right to an attorney, and failed to fully inform them of the charges they faced. Prosecuting attorneys and attorneys defending juveniles before the judges have faced heavy criticism for what some consider an unseemly relationship between attorneys and the judicial branch that detrimentally affects the rights of parties appearing before the Luzerne County Court of Common Pleas. *See generally*, "Red Flags Seen Early, Panel Told," Timesleader.com, http://www.timesleader.com/news/hottopics/judges/Red_flags_seen_early__panel_told_01-22-2010.html. The two judges have also been accused of case fixing. *See* "It Puts Pall Over All of Us," Pa. Law Weekly, Vol 32, No. 15 (April 13, 2009).

and has duly promulgated Rule 150 of the Pennsylvania Rules of Criminal Procedure, set forth above. In sum, it requires that an arrested person be taken "without unnecessary delay" to a hearing on the bench warrant, which "shall be conducted by" a judicial officer. The Rule contemplates that the hearing officer will be the judge who issued the bench warrant, a magisterial district judge, or an appropriate judicial designee. Pa.R.Crim.P. 150.

The Rule presumes that, until the hearing, the detainee will be housed in the county jail. The terms on the face of the bench warrant issued in Bittner's case complied with the requirements of Pa.R.Crim.P. 150. However, directly contrary to the established rule and the terms of the bench warrant on its face, the District Attorney directed the arresting officer to transport Bittner directly to his office.

5. Bittner filed her Complaint in the United States District Court for the Middle District of Pennsylvania on April 16, 2008. Bittner claimed that the municipality of Snyder County was liable for the violation of her federal rights that stemmed from the unconstitutional practices instituted by the District Attorney, a chief policy-maker for the County, as a matter of municipal custom or policy. On June 12, 2008, Respondents filed their Motion to Dismiss under the Federal Rules of Civil Procedure, Rule 12(b). The record is scanty, as one would expect when a case is decided on the pleadings. The District Court entered an Order and Memorandum on January 26, 2009, granting Respondents' Motion and dismissing the Complaint in its entirety.

Bittner filed her Notice of Appeal on February 9, 2009. The Third Circuit's decision was entered on September 23, 2009. Bittner timely filed her Petition for Rehearing en Banc or, in the Alternative, for Panel Rehearing on October 8, 2009, which was denied on November 12, 2009.

REASONS FOR ALLOWANCE OF THE WRIT

1. The Third Circuit Court of Appeal's Opinion in this matter has decided an important question of federal law that conflicts with relevant decisions of this Court, and which have been properly applied by other Circuit Courts of Appeals: Is the federal Constitutional guarantee of due process violated when a bench warrant arrestee is denied judicial review of the bench warrant by the unilateral and egregious actions of the District Attorney, who questions her at will and with the assistance of police, and perfunctorily vacates the bench warrant upon misleading facts, thereby evading judicial review of his conduct?

The District Court held that Bittner's Complaint naming the District Attorney had been asserted against him "in the course of his role as advocate for the State ...," and was therefore precluded by 11th Amendment immunity. (Appendix, District Court Op. at pp. 13-15.) The Third Circuit appropriately corrected that error, finding that Bittner's claims alleged in her Complaint were lodged against the municipality rather than the District Attorney in his individual capacity, and therefore 11th

Amendment immunity did not apply. (Appendix, Third Circuit Court of Appeals' Op. at pp. 4-5.)

The District Court had also found that qualified immunity protected the District Attorney against Bittner's claims that he had unconstitutionally deprived her of liberty and the procedural due process requirement that she be provided a judicial determination of whether she was in contempt of court for willfully disobeying the subpoena for her ex-husband's criminal trial. Furthermore, the District Court determined that Bittner's constitutional rights were not violated "when, after arriving in Snyder County, [Bittner] was taken directly to [the District Attorney's] office at which time he interviewed [Bittner], was made aware of her transportation requests, and vacated the bench warrant." (District Court op. at 17-18, emphasis in original.)

The Third Circuit Court of Appeals, having held that the District Attorney's immunity was not attributed to the benefit of the municipality, nevertheless agreed with the District Court that no constitutional violation occurred because "the arrest warrant was vacated before a hearing could be conducted." (Opinion at 6.) Neither the District Court, nor the Third Circuit Court of Appeals, analyzed the District Attorney's post-arrest and pre-hearing interrogation as Due Process considerations require, and neither cited any authority for their errant conclusion.

In order to prove a cause of action under 42 U.S.C. § 1983, a plaintiff must produce evidence of (1)

misconduct that was committed by a person acting under color of state law; and (2) that as a result of such misconduct, the plaintiff was deprived of rights, privileges, or immunities secured by the Constitution or laws of the United States. *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 2254-55, 101 L.Ed.2d 40 (1988). The first step in evaluating a section 1983 claim "is to identify the exact contours of the underlying right said to have been violated" and, of course, to determine whether the plaintiff has alleged a deprivation of a constitutional right at all. *Graham v. Connor*, 490 U.S. 386, 394, 109 S.Ct. 1865, 1870-71, 104 L.Ed.2d 443 (1989), *cited in County of Sacramento v. Lewis*, 523 U.S. 833, 841 n.5, 118 S.Ct. 1708, 1714 n.5, 140 L.Ed.2d 1043 (1998); *Nicini v. Morra*, 212 F.3d 798, 806 (3d Cir. 2000) (en banc).

Here, both the District Court and the Third Circuit Court of Appeals agreed that Petitioner suffered no deprivation of a Constitutional right when she was arrested and, rather than receiving a judicial hearing on the bench warrant "without unnecessary delay," she was instead taken by the police officer directly to the Office of the District Attorney, where he interrogated her and otherwise verbally abused and threatened her. He then caused the bench warrant to be vacated on misrepresented facts, and had Petitioner abandoned nearly seventy miles from her home. But neither Court considered these alleged facts as pertinent to their conclusory holdings.

After the arrest but before the judicial hearing called for in Pa.R.Crim.P. 150, Bittner is properly classified as a pre-trial detainee. *Revere v.*

Massachusetts Gen. Hosp., 463 U.S. 239, 244, 103 S.Ct. 2979, 2983, 77 L.Ed.2d 605 (1983); *Armstrong v. Squadrito*, 152 F.3d 564, 569-70 (7th Cir. 1998) (an arrest pursuant to a bench warrant follows a judicial determination of sufficient cause, and the rights of such a pre-trial detainee receive the protection of due process); *Gary v. Modena*, 2006 WL 3741364 at *3 (11th Cir. 2006) (defendant was arrested for violation of probation and was therefore a pre-trial detainee); *Russell v. Lazar*, 300 F. Supp.2d 716, 720 (E.D.Wis. 2004) (defendant was arrested on a bench warrant and held on a detainer for an alleged probation violation).

Because Bittner's detention and forced interrogation at the District Attorney's Office occurred before the judge issuing the warrant even considered whether to sanction her for contempt, her claim for the post-arrest conduct is properly analyzed under the 14th Amendment. *County of Sacramento*, 523 U.S. at 845-46, 118 S.Ct. at 1716-17, *citing Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952). The due process rights of pre-trial detainees were announced by the Supreme Court in *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). In *Bell*, the Supreme Court held that conditions of pre-trial detention do not infringe upon a detainee's Fourteenth Amendment due process rights if those conditions do not amount to punishment of the detainee. *Bell* at 535, 99 S.Ct. at 1871. Restrictions on the liberty of pre-trial detainees do not constitute punishment if the restrictions are rationally related to a legitimate nonpunitive government objective. *Id.* at 539, 99 S.Ct. at 1874. See also *Union County Jail Inmates v.*

Di Buono, 713 F.2d 984, 992 (3d Cir. 1983), *cert. denied,* 465 U.S. 1102, 104 S.Ct. 1600, 80 L.Ed.2d 130 (1984) (applying the *Bell* test for conditions of pretrial detention).

Under the 14th Amendment's Due Process Clause, the question has also been asked as whether an executive abuse of power shocks the conscience:

> To this end, for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience. We first put the test this way in *Rochin v. California, supra,* at 172-73, 72 S.Ct. at 209-10, where we found the forced pumping of a suspect's stomach enough to offend due process as conduct "that shocks the conscience" and violates the "decencies of civilized conduct." In the intervening years we have repeatedly adhered to *Rochin*'s benchmark.

Armstrong, 152 F.3d at 570, *citing County of Sacramento*, 523 U.S. at 846-47, 118 S.Ct. at 1717.

The District Attorney's conduct in this case can only be viewed as punitive toward Bittner. There were adequate procedural means in place that, had they been followed as mandated, would have entailed a judicial determination of whether or not Bittner had, indeed, willfully disobeyed the subpoena to testify at the trial of her ex-husband. Indeed, the District Attorney's rogue conduct is shocking to the conscience.

With regard to procedural due process, the Supreme Court has "repeatedly held that state statutes may create liberty interests that are entitled to the procedural protections of the Due Process Clause of the 14th Amendment." *Vitek v. Jones*, 445 U.S. 480, 488, 100 S.Ct. 1254, 1261, 63 L.Ed.2d 552 (1980), and cases cited therein. Thus, where a state provides for a hearing "without necessarily delay" on a bench warrant, and the District Attorney arbitrarily abrogates that right by commandeering the arrestee's body for his own private interrogation, Due Process serves to protect that liberty interest. *See Roberson v. County of Essex*, 2006 WL 2844425 at *7 (D.N.J. 2006) (state court rule provided for a defendant's first appearance following the filing of a complaint "within 72 hours after arrest, excluding holidays, and shall be before a judge with authority to set bail for the offense charged"). The "non-discretionary" court rule in *Roberson*, just like Pennsylvania's Rule 150, "indicate the 'liberty interest in freedom from incarceration without speedy pretrial procedures.'" *Roberson*, 2006 WL 2844425 at *8.

Here, Bittner's liberty interests were denied without any procedure whatsoever. Due process was denied despite the significant liberty interest involved, the minimal cost of ensuring an appearance before a judge "without unnecessary delay," and the likelihood that such minimal procedure would have prevented the type of harm that fell upon Bittner here. *Id., citing Matthews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). State action that "shocks the conscience" of the court, *Rochin* at 172, 72 S.Ct. at 209, or which is highly offensive to the

"concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937), has led this Court to find a denial of due process. The abuse of power that the District Attorney here exercised—mishandling the person of a defendant arrested on a bench warrant while intentionally misleading the supervising judicial officer to prevent discovery of his unconstitutional and abhorrent conduct—is wholly inconsistent with notions of "fundamental fairness" that is required under the Due Process Clause. *See, e.g., California v. Trombetta*, 467 U.S. 479, 485, 104 S.Ct. 2528, 2532, 81 L.Ed.2d 413 (1984).

In *Collins v. Harker Heights*, 503 U.S. 115, 126, 112 S.Ct. 1061, 1069, 117 L.Ed.2d 261 (1992), the United States Supeme Court noted that the Due Process Clause was intended to prevent government officials "'from abusing [their] power, or employing it as an instrument of oppression,'" *quoting DeShaney v. Winnebago County Dept. of Social Servs.*, 489 U.S. 189, 196, 109 S.Ct. 998, 1003, 103 L.Ed.2d 249 (1989). The District Attorney's conduct at issue in this case is clearly an abuse of his power, and warrants a proper analysis under the 14th Amendment's Due Process Class consistent with the decisions of this Court.

CONCLUSION

For all of the above reasons, Petitioner respectfully requests that the issuance of a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully, submitted,

DONALD L. REIHART*
JAN S. BARNETT
THE LAW OFFICES OF
DONALD L. REIHART
3015 Eastern Boulevard
York, PA 17402
(717) 755-2799

* *Counsel of Record* *Attorneys for Petitioner*

CERTIFICATE OF SERVICE

I, Donald L. Reihart, Esquire, certify that a true and correct copy of the foregoing Appellant's Brief and Appendix, Volumes I and II, were caused to be served on the date shown below by depositing same in the United States mail, first-class, postage prepaid thereon, addressed as follows:

David L. Schwalm, Esq.
Thomas, Thomas & Hafer
305 North Front Street
PO Box 999
Harrisburg, PA 17108

Respectfully, submitted,

DONALD L. REIHART*
JAN S. BARNETT
THE LAW OFFICES OF
DONALD L. REIHART
3015 Eastern Boulevard
York, PA 17402
(717) 755-2799

* *Counsel of Record* *Attorneys for Petitioner*